



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 22, 2006

Ms. Elizabeth Burmaster
Superintendent
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125 South Webster Street
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Mr. Ernest M. Keppler
President
Sheboygan County Taxpayers Alliance
St. Nicholas Office Center
901 Superior Avenue, Rm. 206
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Ms. Merry Zarafonetis
3025 North Ninth Street, Apt. 4
Sheboygan, WI 53083

Dear Ms. Burmaster, Mr. Keppler and Ms. Zarafonetis:

You each have requested that the Wisconsin Department of Justice determine whether it is lawful for a municipal library board to enter into a contract with a municipal library director that provides that the library director will be employed for a certain number of years, that the library director may be terminated only for cause and/or that the library director will receive a lump sum payout if terminated without cause. You also each indicate that the League of Wisconsin Municipalities ("League") has issued legal advice indicating that municipal library boards lack the authority to enter into contracts with library directors containing such provisions.

The fact situation that gives rise to your inquiries involves a municipality that has not entered into any contracts with unrepresented employees. By ordinance, that municipality has provided that certain department heads will be appointed to five-year terms and that those department heads may be discharged only for cause by a three-fourths vote of the city council. The municipality has enacted no civil service or similar personnel ordinance that expressly prohibits contracts with municipal employees or that establishes a specific legal standard for termination of all municipal employees. There currently is no actual controversy concerning the

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appropriate source of funds if termination of the library director were to occur because termination has not been threatened or even contemplated. The municipality has enacted certain ordinances specifying the composition of the library board, specifying the terms of members of the library board, requiring that the finance committee of the city council attend certain meetings of the library board and requiring the library board to audit and approve vouchers involving expenditures by the library. The ordinances that have been enacted by the municipality do not appear to have any bearing on the general question of the authority of a municipal library board under state law to enter into a contract with a library director that provides that the library director will be employed for a certain number of years, that the library director may be terminated only for cause and/or that the library director will receive a lump sum payout if terminated without cause.

It is our opinion that a municipal library board is authorized under Wisconsin law to enter into a contract with a library director specifying conditions of employment that may include provisions stating that the library director will be employed for a certain number of years, that the library director may be terminated for cause and/or that the library director will receive a lump sum payout if terminated without cause.

Section 43.58 of the Wisconsin Statutes provides in part:

(1) The library board shall have exclusive control of the expenditure of all moneys collected, donated or appropriated for the library fund, and of the purchase of a site and the erection of the library building whenever authorized. The library board also shall have exclusive charge, control and custody of all lands, buildings, money or other property devised, bequeathed, given or granted to, or otherwise acquired or leased by, the municipality for library purposes.

(2) The library board shall audit and approve all vouchers for the expenditures of the public library and forward the vouchers or schedules covering the same, setting forth the names of claimants, the amounts of each claim and the purpose for which expended, to the appropriate municipal or county financial officer or, in the case of a school district, the school district clerk, with a statement thereon, signed by the library board secretary or other designee of the library board, that the expenditure has been incurred and that the library board has audited and approved the bill. The municipal, county or school district governing body shall then pay the bill as others are paid.

....

(4) Notwithstanding ss. 59.17(2)(br) and 59.18(2)(b), the library board shall supervise the administration of the public library and shall appoint a

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librarian, who shall appoint such other assistants and employees as the library board deems necessary, and prescribe their duties and compensation.

Section 43.58(4) authorizes the library board to “supervise the administration of the public library.” Section 43.58(4) authorizes the library director to determine the compensation and establish the duties of library staff under the general supervision of the library board. The library board possesses those powers that are fairly implied from those powers expressly conferred upon it by statute. *See* 77 Op. Att’y Gen. 193, 194 (1988).

Each of your inquiries makes prominent mention of legal advice provided by the League. The League has advised that, despite the authority expressly and impliedly granted the library board under section 43.58(4), the discussion in 28 Op. Att’y Gen. 386 (1939) means that a library board has no authority to set terms and conditions of employment for the library director or other library employees. In 76 Op. Att’y Gen. 203, 204 (1987), the legislative declarations enacted in 1985 Wisconsin Act 177, section 6 that are now contained in section 43.001 were construed to mean “that libraries, including local municipal libraries, are a matter of statewide concern because they are critical to the educational and the democratic processes.” 28 Op. Att’y Gen. 386 was issued long prior to the enactment of these legislative declarations.

At least one basis for the 1939 opinion is also contrary to the legislative declarations. The 1939 opinion rejects the legal concept “that the administration of schools is strictly the state’s function,” on the basis that “this is not true of libraries, since their creation and operation is usually considered a municipal function.” 28 Op. Att’y Gen. at 391. After the enactment of 1985 Wisconsin Act 177, section 6, it is clear that under current law the operation of municipal libraries is a state function—*i.e.* a matter of statewide concern, as is the administration of public schools.

In addition, 28 Op. Att’y Gen. 391 ultimately concludes only “that employees of a library board are ‘municipal personnel’ within the meaning of sec. 66.19 [the civil service statute], as it now stands, and that [a] bill . . . need not be adopted to accomplish such result.” It is unnecessary to address the validity of that conclusion in the factual situation that you present because there is no municipal civil service or other personnel ordinance generally applicable to all employees of the municipality involved. In the factual situation that you present, no federal or state law or municipal ordinance arguably prohibits the action taken by the library board.

Compensation is paid over prescribed periods of time established by the employer. Compensation may also be payable to the employee upon termination of employment by the employer or by the employee. Although 28 Op. Att’y Gen. 386 never uses the phrase “terms and conditions of employment,” Wisconsin case law does establish what the phrase “conditions of employment” is generally understood to mean. *See, e.g., WDER v. Bldg. Trades Negotiating Comm.*, 2003 WI App 178, ¶ 27, 266 Wis. 2d 512, 669 N.W.2d 499: “The term ‘conditions of

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employment' is . . . linked with such terms as 'wages,' 'rates of pay,' 'hours,' 'fringe benefits,' 'hiring,' 'promotion,' 'compensation' and 'tenure.'" These items are so interrelated that it is unreasonable to conclude that section 43.58(4) grants the library board and the library director authority to act only with respect to "compensation" but not with respect to the rest of these items. It is our opinion that section 43.58(4) expressly or impliedly grants the library director authority over conditions of employment as to library employees, subject to the supervision of the library board and that section 43.58(4) impliedly grants the library board authority over conditions of employment as to the library director. Such conditions of employment may include provisions stating that the library director will be employed for a certain number of years or that the library director will receive a lump sum payout if terminated without cause. The ability to establish conditions of employment also directly implicates the ability of the library board to control expenditures from the library fund under the rationale of 77 Op. Att'y Gen. 193 and 65 Op. Att'y Gen. 182 (1976).

Bldg. Trades, 266 Wis. 2d 512, ¶ 27, holds that "conditions of employment" encompasses "tenure." An ordinance or contract providing that an employee can only be discharged for cause simply grants that employee a form of tenure. *See, e.g., Vorwald v. School Dist. of River Falls*, 167 Wis. 2d 549, 557, 482 N.W.2d 93, *cert. denied*, 506 U.S. 941 (1992). *Adamczyk v. Caledonia*, 52 Wis. 2d 270, 190 N.W.2d 137 (1971), a case cited in the legal advice provided by the League, does not preclude a municipality from entering into individual contracts with its employees providing that they can only be discharged for cause. The municipality involved has entered into a number of such contracts with appointed department heads. Such contracts are commonplace throughout the state.

Adamczyk did not involve an individual employment contract. In *Adamczyk*, 52 Wis. 2d at 271-72, the plaintiff claimed that his employment was unlawfully terminated because the "town board had entered into a contract regulating the terms and conditions of employment for employees of the Town of Caledonia, that the plaintiff was one of the parties to that contract, and that . . . the contract provided that employees may be dismissed for cause." The court stated the applicable principle of law to be that "[i]n the absence of civil service regulations or properly authorized statutory rules governing labor relations, a municipal employee has no tenure in his public service." *Adamczyk*, 52 Wis. 2d at 273-74. The court held that any such contract was invalid because no statute in effect at that time permitted a town to enter into a general contract with all of its employees stating that they could only be fired for cause. *Adamczyk*, 52 Wis. 2d at 275-76.

Adamczyk was distinguished almost immediately in *Richards v. Board of Education*, 58 Wis. 2d 444, 460a-460b, 206 N.W.2d 597 (1973):

Adamczyk, supra, involved a personal employment contract rather than a collective bargaining agreement enacted in accordance with sec. 111.70, Stats.:

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“The Municipal Employment Relations Act.” Prior to 1971, municipal employers did not have to bargain collectively with employee unions. . . .

....

Under the act, a school district is considered to be a “municipal employer,” sec. 111.70(1)(a), Stats., and this court has no difficulty in concluding that a grievance procedure established by a collective bargaining agreement, and relating to dismissals falls within the embrace of “wages, hours and conditions of employment,” and that the conditions of such an agreement are binding on the parties.

The currently applicable principle of law is now widely understood to be that “[a]bsent civil service regulations or laws, **or a contract** or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment.” *Vorwald*, 167 Wis. 2d at 557 (emphasis supplied). The library board possesses the implied authority to establish the compensation of the library director. Compensation is most often established by contract. The library board also possesses the implied authority to enter into contracts. *See* 77 Op. Att’y Gen. 193. Under the facts presented, the library board therefore has the authority under state law to enter into a contract with the library director providing that the library director may only be terminated only for cause.

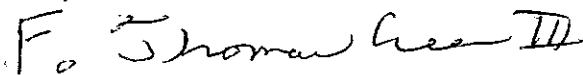
Finally, it should be noted that 28 Op. Att’y Gen. at 389 also relies upon New Jersey law. Twenty years after the issuance of that 1939 opinion, the New Jersey Attorney General concluded in Formal Opinion 1959 No. 10 (May 10, 1959) (copy enclosed) “that the municipality cannot enforce in respect to the library any provision of the ordinance which attempts to detract from the statutory power of the trustees to hire employees, fix their compensation, and make personnel rules and regulations[.]” Since there is no generally applicable municipal personnel ordinance in the factual situation involved here, it is unnecessary to engage in an extended analysis of the differences and similarities between the Wisconsin statutes governing library boards and the New Jersey statutes governing library boards. It is clear, however, that the 1939 opinion could not have considered the extensive legal analysis performed by the New Jersey Attorney General twenty years later in Formal Opinion 1959 No. 10.

We therefore conclude that a municipal library board is authorized under Wisconsin law to enter into a contract with a library director specifying conditions of employment that may include provisions stating that the library director will be employed for a certain number of

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years, that the library director may be terminated for cause and/or that the library director will receive a lump sum payout if terminated without cause.

Sincerely,

A handwritten signature in black ink, appearing to read "F. Thomas Creeron III". The signature is written in a cursive, flowing style.

F. Thomas Creeron III
Assistant Attorney General

FTC:cla

Enclosure

c: The Honorable Joseph Leibham
State Senator

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May 29, 1959

Hon. Joseph E. Clayton
Assistant Commissioner of Education
175 West State Street
Trenton, New Jersey

FORMAL OPINION 1959 NO. 10

Dear Commissioner:

You have requested our opinion as to the validity of a so-called "personnel ordinance" of a municipality insofar as it purports to apply to the board of trustees of the free public library of that municipality. The question arises because of the apparent conflict between such an ordinance and N.J.S.A. 40:54-12, which among other things authorizes the board of library trustees to "hire librarians, and other necessary personnel, and fix their compensation."

Ordinances of the type in question may include substantially the following provisions:

1. The governing body shall establish an employment policy relating to all municipal government operations, and shall approve the creation of any new position.
2. A new position cannot be filled by any municipal department without prior authorization from the governing body, which must also provide in its budget a specific amount for the compensation of each new appointee.
3. Vacancies in positions are to be filled by the governing body by selection from a list of applicants, such list in some cases being compiled by a central personnel office.
4. All positions in the municipal service shall be classified according to duties and responsibilities, with a view to establishing similar requirements as to training and experience and similar rates of compensation with respect to positions in each class.
5. Schedules of annual or hourly rates of compensation are prescribed for the respective classes of positions.
6. Schedules are also prescribed to govern hours of work, attendance requirements and their enforcement, and similar matters. The schedules may either be established by the governing body or by a personnel office.
7. Rights to and the extent of vacation leave, sick leave, and special leave are set forth on

a uniform basis.

8. Promotions and dismissals must be approved by the governing body or by a personnel office.

9. Retirement policies and procedures are established, including provisions for an optional and for a mandatory retirement age.

10. In some cases, grievance procedures are provided for, with jurisdiction being given to a personnel office to adjudicate the matter.

Provisions such as the foregoing may presumably be adopted pursuant to N.J.S.A. 40:48-1 and 40:48-2, which together authorize the governing body of every municipality to make ordinances which "prescribe and define, except as otherwise provided by law, the duties and terms of office or employment, of all officers and employees; and to provide for the employment and compensation of such officials and employees, in addition to those provided for by statute, as may be deemed necessary for the efficient conduct of the affairs of the municipality," and to make such other ordinances "not contrary to the laws of this State or of the United States, as it may deem necessary and proper * * * to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."

Our opinion, in brief, is that the library trustees and the governing body of the municipality each have certain prerogatives vested in them respectively by statute, that these should be reconciled and given effect as far as possible; but that those sections of the ordinance which plainly conflict with the powers granted to the library trustees expressly or by fair implication must be ruled invalid so far as library personnel are concerned. It is well settled that to the extent an ordinance conflicts with the mandate of the State Legislature, it is of no effect. N.J.S.A. 40:48-2; *Strauss v. Bradley Beach*, 117 N.J.L. 45, 46 (Sup. Ct. 1936), *aff'd* 118 N.J.L. 561; *Pennsylvania R. R. Co. v. Jersey City*, 84 N.J.L. 716 (E. & A. 1913); *Hertz Washmobile System v. South Orange*, 41 N.J. Super. 110 (Law Div. 1956).

N.J.S.A. 40:54-1, et seq. provides for the establishment of a free public library within the corporate limits of any municipality by a referendum vote of the people. Section 40:54-11 provides that the board of trustees "shall be a body corporate," with corporate powers of succession and to sue and be sued. Appointments are made by the mayor or other chief executive of the municipality, N.J.S.A. 40:54-9. Section 40:54-12 reads, so far as here pertinent, as follows:

"The board shall hold in trust and manage all property of the library. It may rent rooms, or, when proper, construct buildings for the use of the library, purchase books, pamphlets, documents, papers and other reading matter, hire librarians, and other necessary personnel, and fix their compensation, make proper rules and regulations for the government of the library, and generally do

all things necessary and proper for the establishment and maintenance of the free public library in the municipality."

Tax support for the library is provided by N.J.S.A. 40:54-8, which requires the governing body of every municipality governed by this statute to appropriate annually and raise by taxation a sum equal to one-third of a mill on every dollar of assessable property within such municipality; and the section further authorizes the governing body to appropriate and raise by taxation annually such additional sum as in its judgment is necessary for the proper maintenance of the library. The trustees have the power to hold and manage any devise, bequest or donation for the establishment or maintenance of the library (N.J.S.A. 40:54-19), and to accept gifts and bequests of paintings and other art objects (N.J.S.A. 40:54-20); but where gifts are made for the purpose of building a library, they must be accepted by the governing body, which thereafter must raise annually by taxation such amount as may be required by the condition of the gift for the support and use of the library (N.J.S.A. 40:54-21). Any gift accepted by the governing body for library purposes shall be expended by and under the direction of the library board of trustees, in the same manner as other funds are expended by such board (N.J.S.A. 40:54-22).

The foregoing sections of the law indicate a general scheme under which a free public library shall receive its financial support partly by mandatory taxation and partly through the exercise of discretion by the governing body, and that once such funds have been obtained for library purposes, their expenditure is a matter resting solely with the trustees. The evident legislative intent was to give the library trustees a large measure of autonomy and independence, in a manner somewhat analogous to the independent status given chapter 7 school districts under N.J.S.A. Title 18. By express mandate of the statute, the custody and control of the library, its property and its funds are vested in the trustees; they are specifically authorized to hire librarians and other personnel and to fix their compensation; and they are given all the incidental powers necessary and proper to the exercise of the duties specifically imposed upon them. By implication, the statute plainly excludes any interference by the municipal governing body with the exercise of the powers granted to the trustees.

On the other hand, our Courts have placed limitations upon this seemingly autonomous statutory power. In *Newark Library Trustees v. Civil Service Commission*, 86 N.J.L. 307 (E. & A. 1914) the Court held that the employees of the free public library of the city of Newark were "in the paid service of the municipality," and that since the city had accepted the provisions of the Civil Service Act, the library employees were subject to the provisions of that Act and could accordingly be classified by the Civil Service Commission. More recently, the Supreme Court held in *Glick v. Trustees of Free Public Library*, 2 N.J. 579 (1949) that the free public library of Newark was "an agency of the municipality notwithstanding its incorporation as a body politic", so that it was embraced within the provision of N.J.S.A. 40:50-1 forbidding a "municipality" from entering into a contract of the class specified unless competitive bidding procedures had been followed. The opinion of the Court, rendered by Mr. Justice Neher, noted that "it

would be contrary to the plain policy of the statute to hold that the central government is bound by the provision for competitive bidding but the library board is not merely because, for the purpose of convenience in administration, it has been given a corporate status." (2 N.J. at p. 584). In reviewing the legislative and judicial authority it was stated at page 583 that:

"* * * the old Supreme Court ruled that the Trustees form 'a branch or a board of the municipal government, * * * to manage educational matters for the benefit of the whole community,' and not an 'independent entity,' and, while given a corporate existence 'for * * * convenience and for the purposes of * * * administration,' the corporate body is yet 'a mere branch or agency for that special purpose.' The Court of Errors and Appeals found it sufficient to rest affirmance of the particular judgment on the narrower ground that the employees of the Library are 'in the paid service of the municipality,' and therefore subject to the provisions of the Civil Service Act. Trustees of Free Public Library of Newark v. Civil Service Commission, 83 N.J.L. 196 (Sup. Ct. 1912); affirmed, 86 N.J.L. 307 (E. & A. 1914).

"There is no need to delineate the statutory scheme. It suffices to say that the function delegated to the library management is local and municipal in legislative concept; the instrumentality is an adjunct of the local government in the field of education and intellectual recreation, and under its control. It is the municipality that is empowered to 'establish a free public library within its corporate limits.' R.S. 40:54-1. There is provision for a referendum. R.S. 40:54-2 et seq. The cost of operation is borne by local taxation; and the money is appropriated by the local governing body or appropriate board. R.S. 40:54-8. The trustees are appointed by the mayor or chief executive; and the mayor and one of the local superintendents of schools or the supervising principal are made members of the board. R.S. 40:54-9. Library funds are deposited in the municipal treasury, and drawn upon by municipal officers on the vouchers of the trustees. R.S. 40:54-18. And, as we have seen, the library employees are in the paid service of the municipality. It is an agency of the municipality notwithstanding its incorporation as a body politic. That in itself does not give rise to a relationship radically different in character from that which would otherwise exist. It is that substance and not the form of the creation that is the key to the legislative design.

* * *

We are thus presented with the problem of pinpointing the fine line which limits the autonomy given by the Legislature to the library trustees. Some light is shed on the problem by the recent decision of Judge Kolovsky in *Grosso v. City of Paterson and Board of Health of the City of Paterson*, - N.J. Super. - (Law Div. 1959), which involved a statute (N.J.S.A. 26:3-19) giving to local boards of health the power to "employ such personnel as it may deem necessary * * * to carry into effect the powers vested in it" and to "fix the duties and compensation of every appointee." The Court held that even though the municipality determines the amount of moneys to be appropriated to the local board of health (N.J.S.A. 26:3-43), the former has no power to intrude upon the prerogative of the local board in appointing its agents and employees and fixing their compensation, nor could the municipal governing body veto salaries fixed by ordinance of the board of health.

In the light of the statutes and the decisions above cited, we believe the situation under discussion is governed by the general principle that the municipality cannot enforce in respect to the library any provision of the ordinance which attempts to detract from the statutory power of the trustees to hire employees, fix their compensation, and make personnel rules and regulations peculiarly needed public library.

We find it significant that the foregoing view is consistent with constructions given to the law for many years by the Attorney General and the Director of Local Government, as well as by the former Public Library Commission. For example, Attorney General Wilentz, by an opinion to the State Librarian dated June 16, 1942, ruled that the library Law places the hiring of librarians and other necessary servants and the fixing of their compensation in the hands of the board of trustees, who were thus authorized by Section 40:54-12 to select a librarian and other necessary personnel. On November 1, 1951, in a letter to the Division of the State Library, the Director of Local Government advised that in municipal budgets it was not required that the appropriation for the maintenance of a free public library be subdivided into (a) salaries and wages, and (b) other expenses; the appropriation for the library is a line item in a given amount. On December 5, 1951, the Director of Local Government further advised the Division of the State Library that the moneys raised for the library trustees are expended at their discretion, and that so long as they are properly used for library purposes, the governing body of a municipality has no jurisdiction over the matter. On November 29, 1944, the Attorney General advised the State Librarian that the library trustees had the authority to allow one or more of the employees of the library to attend meetings or conferences and to pay their expenses, and that in matters of this kind "much must be left to the judgment of the trustees."

A construction of a statute indulged in for many years by those charged with its administration and interpretation is entitled to great weight. *State v. Clark*, 15 N.J. 334 (1954); *Burlington Co. v. Martin*, 129 N.J.L. 92, 93 (E. & A. 1942). We find no reason for departing from the opinions just enumerated.

The board of library trustees and the governing body of the municipality are public officials serving the same group of citizens, and the spirit of the law calls for the closest

cooperation between them, with the trustees adopting different policies and practices only to the extent that these are specially needed for the maintenance of the library committed to their charge.

Very truly yours,

DAVID D. FURMAN
Attorney General

By _____
Thomas F. Cook
Deputy Attorney General

TPC:tb